BEFORE THE HONORABLE

Supreme Court of the United States

OF AMERICA

No.

HOMER HYCHE,

Petitioner,

versus

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

Comes now your petitioner, Homer Hyche, and petitions for Writ of Certiorari directed to the United States Court of Appeals, Fifth Circuit, and in support thereof shows the following:

OPINION OF THE COURT BELOW

On May 31, 1960, in case No. 18152, the United States Court of Appeals, Fifth Circuit, dismissed the appeal of petitioner. The opinion of the Court of Appeals has not been officially reported and is annexed hereto. See Appendix A.

On July 21, 1960, the Court denied Petition for Rehearing without opinion.

EMENT OF GROUNDS INVOKING JURISDICTION

tioner was tried by judge and jury in the United District Court for the Northern District of Alabama ictment charging violations of Title 26, United States Section 7206 (4), 5008 (b) (1), and Title 18 United Code 371. From verdict of guilty and judgment n, Petitioner appealed to the United States Court eals, Fifth Circuit.

verdict was rendered on December 2nd, 1959. Judg- and commitment of the defendant was entered on me date, but not in the presence of or with notice to the defendant-petitioner.

ence was suspended until January 7, 1960 and the ant had no notice of the judgment entry until De- 15, 1959 and on December 18, 1959 filed notice of to the Court of Appeals, Fifth Circuit.

QUESTIONS PRESENTED FOR REVIEW

question presented for review is whether an appeal y taken if within ten days from actual and effec- otice of the judgment entry appealed from, the nt having been entered without notice to defend- e than ten days prior to appeal.

questions presented to the Circuit Court of Ap- ut not ruled on were:

Was petitioners' right to trial by an impartial jury ed upon when another defendant, jointly indicted

was allowed by the trial court to enter a plea of
the presence of the venire impanelled to try the
.

as the petitioner entitled to a general charge of
when the evidence failed to prove that he re-
eposited, concealed and possessed untaxed spirits,
being the violations charged in the counts of
was convicted.

STATUTES INVOLVED

itioner was indicted for conspiracy to defraud
d States of taxes on spiritous liquors (Title 18,
ates Code 371) and for various substantive of-
der Title 26, United States Code 7206 (4) and
nited States Code 5008 (b) (1). See appendix D.
cquitted of the conspiracy charge and convicted
substantive counts.

STATEMENT OF THE CASE

as some evidence of a conspiracy between pe-
harlie Frank Lee, Willie Lee Thomas and Floyd
iolate the Internal Revenue Laws with respect
ation of distilled spirits. However, petitioner
re acquitted of this charge by the jury.

s also evidence that Charlie Frank Lee removed,
and concealed distilled spirits with intent to
e United States of a tax thereon. However,
not a scintilla of evidence that petitioner sold,
eposited and concealed spirits with such intent.

oner seasonably moved for a general charge of ac-
as to each count, which charge was refused.

petitioner and Lee were convicted of the substan-
nts of the indictment, that is to say, of removing,
ng, and concealing distilled spirits with intent to
the United States of the tax imposed upon them.

Lee Thomas was not brought on for trial with
o defendants and Floyd Kopp, Jr., who was also
jointly with them entered a plea of guilty in
ence of the venire from which the trial jury was
ed.

ner moved to quash the venire and for a con-
, assigning as grounds that he could not obtain an
l trial at the hands of a jury which heard his co-
t enter a plea of guilty. This motion was over-
ollowing the verdict of guilty, the Court announced
tence would be imposed, and granted a stay of exe-
ntil January 7, 1960, continuing the bond of peti-
the meantime. See appendix E. No entry of
t was made in the petitioners' presence and he had
e thereof, actual or otherwise, until it was dis-
by his counsel on December 15, 1959 that judg-
l been entered on December 2, 1959. Notice of
as then promptly filed and within ten days from
d effectual notice of the judgment entry.

roceedings which took place in the presence of
ndants and their counsel on December 2, 1959
fulfill the requirements of *Rule 32 (b) Federal*

iminal Procedure in that said proceedings did
the plea, the verdict or findings, and adjudica-
as required by said rule. See appendix E.

ARGUMENT

REASONS RELIED ON FOR OWANCE OF WRIT OF CERTIORARI

t case is very much in point with the decisions
t in *Rosenbloom v. United States*, 78 S. Ct.
S. 80, 2 L ed. (2d) 110 and the decision of the
peals for the Fifth Circuit in the instant case
with the ruling of this Court in the *Rosenbloom*
so contrary to the due process clause of Amend-
stitution of the United States.

it is respectfully submitted that the holding
t in the Rosenbloom case should be clarified
shed from *United States v. Robinson*, 4 L. ed.
he *Robinson* case, the Court held that the time
ice of appeal could not be extended. However,
om case should be distinguished in that the
nined the time for filing was commenced to
l notice of entry of judgment. For guidance
rts, we submit that this Court should clearly
at, while the lower courts may not extend
filing notice of appeal, they may in a proper
ne when that time is started tolling by notice
dgment.

ntry of judgment, not the imposition of sen-
starts the tolling of time for taking an appeal.

This is the clear language of Rule 37 (a) (2), *Federal Rules of Criminal Procedure*. See appendix E.

Due process requires notice of the entry of judgment to a party who has made an appearance and is not in default. Proceedings "too ambiguous to permit the conclusion that petitioner and his attorney were not justified in believing that petitioner's time to appeal would begin to run" on the day of committment were held by this Court not to constitute notice of entry of judgment, in the *Rosenbloom* case.

In the *Robinson* case it was not contended that the appellant failed to receive notice of entry of judgment. Instead, the failure there to file a timely appeal was entirely due to inadvertence or neglect after notice. The *Robinson* case is, therefore, to be distinguished from the instant case and the *Rosenbloom* case, in which appeals were taken within ten days from effective notice of entry of judgment.

Wherefore, the petitioner respectfully submits that Writ of Certiorari should be granted, in order that the apparent conflict between the *Rosenbloom* and *Robinson* cases will be clarified and the benefit of due process of law accorded to your petitioner.

Petitioner, therefore, respectfully prays that the Writ be granted.

George E. Trawick
Attorney for Petitioner

CERTIFICATE OF SERVICE

Comes now the undersigned, George E. Trawick, Attorney of record for the petitioner, and a member of the Bar of the Supreme Court of the United States, and in accordance with the requirements of Rule 33, Supreme Court Rules, certifies that he has served the foregoing petition for Writ of Certiorari on W. L. Longshore, U. S. District Attorney for the Northern District of Alabama, and attorney of record for the United States of America in this cause, and upon the Solicitor General, Department of Justice, Washington 25, D. C. by depositing the same in a United States Post Office or mail box, with first class postage prepaid, addressed to them at their respective post office addresses, and further that service upon the Solicitor General was by air mail.

This the _____ day of August 1960.

_____

George E. Trawick
Attorney for Petitioner

CORRECTED.

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18152

HOMER HYCHE and CHARLIE FRANK LEE,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

ppeal from the United States District Court for the Northern District of Alabama.

(May 31, 1960)

efore HUTCHESON, JONES and WISDOM, Circuit Judges.

PER CURIAM: The appellants were convicted of ssessing and concealing untaxed liquor. 26 U.S.C.A.

R.C. 1954) §§ 5006(b)(1), 7206(4). Sentences were posed in open court on December 2, 1959.[1] Written

---

IE COURT: Let the defendants Homer Hyche and Charlie Frank Lee come around.

Mr. Hyche, you have been convicted by the jury here. Do you have any statement you wish to make before the sentence of the law is imposed upon you?

DEFENDANT HYCHE: No sir.

MR. TRAWICK: [Attorney for appellants] Judge, just one moment. I would like to make an oral motion in arrest of judgment on conviction on counts nine and eleven, since they are repetitions of the convictions under counts eight and ten, and based on the same factual facts and circumstances.

THE COURT: I overrule your motion.

MR. TRAWICK: All right. In mitigation, let me say this to the court. The defendant was acquitted on the conspiracy, and having conferred with your Honor before, I know that the conspiracy count was given considerable weight by your Honor when it was a charge pending against him.

Now that he has been acquitted of that, I think by the same analogy it should be taken in mitigation in his favor.

THE COURT: I heard the evidence in the case. And based upon the verdict of the jury finding you guilty, Mr. Hyche, I am going to commit you to the custody of the attorney general for a period of fifteen months, to stand committed on January 7th, 1960 at 12:00 noon.

I am also fining you two thousand dollars, for which you will stand committed.

Do you have any statement you wish to make Charlie Frank Lee?

DEFENDANT LEE: No sir.

THE COURT: Do you wish to make any statement in mitigation of punishment before the sentence of the law is imposed upon you?

DEFENDANT LEE: No sir.

THE COURT: Based upon the finding of the jury finding you guilty, or upon the verdict of the jury finding you guilty the court commits you to the custody of the attorney general for a period of eighteen months.

Are you asking for any stay on that?

MR. TRAWICK: Yes sir.

THE COURT: You will stand committed on January 7th, 1960 at 12:00 noon.

The bond of both defendants will be continued in the meantime.

MR. TRAWICK: On that fine for Hyche, will you let him stand committed on that at the same time the sentence starts? We are not prepared on that today, and I would like to have an opportunity to confer with my client as to what our final position might be.

THE COURT: All right, stand committed for the fine on January 7th, 1960, at 12:00 noon.

MR. TRAWICK: Thank you, your Honor.

judgments were entered the same day but notices thereof were not sent to the appellants. Notices of appeal were filed on December 18, 1957. The Government has moved to dismiss the appeal because it was not taken within the time prescribed by Rule 37(a)(2) of the Federal Rules of Criminal Procedure, 18 U.S.C.A.

The appellants urge that the sentences are not judgments of the court but merely an indication of what the sentences would be when imposed at a future time. The point is not well taken. The court's pronouncements could only be regarded as what they were intended to be; that is as sentences for the offenses for which the appellants had been convicted.

Appellants urge that no notice of the entry of the judgment and sentence was given pursuant to Rule 49(c) of the Federal Rules of Criminal Procedure, 18 U.S.C.A., and that the time for taking the appeal did not begin to run until they learned of the entry of a written judgment. There is no merit in the contention. The sentences having been imposed in open court in the presence of the appellants and their counsel, the time for taking the appeal commenced running when the sentences were imposed. *Huff v. United States*, 5th Cir. 1951, 192 F. 2d 911, cert. den. 342 U. S. 946, 72 S. Ct. 560, 96 L. Ed. 703.

No appeal having been taken within the time fixed by the Rule, this Court is without jurisdiction and the appeal is

DISMISSED.

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit
s By CLARA R. JAMES
Deputy
New Orleans, Louisiana
AUG 11 1960
(SEAL)

APPENDIX B

JUDGMENT.
Extract from the Minutes of May 31, 1960

HOMER HYCHE and CHARLIE FRANK LEE,

18152 versus

UNITED STATES OF AMERICA.

his cause came on to be heard on the transcript of the ord from the United States District Court for the North- District of Alabama, and was argued by counsel;

N CONSIDERATION WHEREOF, It is now here or- d and adjudged by this Court that the appeal in this e be, and the same is hereby, dismissed.

APPENDIX C

N THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

NO. 18,152

HOMER HYCHE and CHARLIE FRANK LEE,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

s from the United States District Court for the
Northern District of Alabama.

(July 21, 1960)

ON PETITION FOR REHEARING.

HUTCHESON, JONES and WISDOM, Circuit

URIAM:

ORDERED that the petition for rehearing in the
ntitled and numbered cause be, and it is hereby
D.

APPENDIX D

APPLICABLE STATUTES

§ 371. *Conspiracy to commit offense or to defraud United States*

o or more persons conspire either to commit any against the United States, or to defraud the United or any agency thereof in any manner or for any and one or more of such persons do any act to he object of the conspiracy, each shall be fined e than $10,000 or imprisoned not more than five both.

vever, the offense, the commission of which is the the conspiracy, is a misdemeanor only, the pun- for such conspiracy shall not exceed the maximum ent provided for such misdemeanor.

6 Sec. 5008

or containers of other distilled spirits —

equirements — No person shall transport, possess, or transfer any distilled spirits, unless the im- container thereof has affixed thereto in such s to be broken on opening the container, a stamp g the tax or indicating compliance with the pro- this chapter.

Sec. 7206

n who —

Removal or concealment with intent to defraud ...es, deposits, or conceals, or is concerned in ing, depositing, or concealing any goods or com- es for or in respect whereof any tax is or shall posed, or any property upon which levy is au- ed by section 6331, with intent to evade or defeat sessment or collection of any tax imposed by le; or shall be guilty of a felony and, upon con- thereof shall be fined not more than $5,000.00, risoned not more than 3 years, or both, together e costs of prosecution.

APPENDIX E

CABLE FEDERAL RULES OF CRIMINAL PRO-CEDURE

2. Sentence and Judgment

dgment. A judgment of conviction shall set forth the verdict or findings, and the adjudication and . If the defendant is found not guilty or for any ason is entitled to be discharged, judgment shall ed accordingly. The judgment shall be signed dge and entered by the clerk.

7. Taking Appeal; and Petition for Writ of Cer-

ime for Taking Appeal. An appeal by a defend- be taken within 10 days after entry of the judg- rder appealed from, but if a motion for a new trial st of judgment has been made within the 10-day appeal from a judgment of conviction may be hin 10 days after entry of the order denying the When a court after trial imposes sentence upon nt not represented by counsel, the defendant shall d of his right to appeal and if he so requests, the ll prepare and file forthwith a notice of appeal of the defendant. An appeal by the government horized by statute may be taken within 30 days y of the judgment or order appealed from.

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SEP 15 1960
JAMES R. BROWNING, Clerk

No. 356

In the Supreme Court of the United States

OCTOBER TERM, 1960

HOMER HYCHE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
MALCOLM RICHARD WILKEY,
Assistant Attorney General,
BEATRICE ROSENBERG;
FELICIA DUBROVSKY,
Attorneys,
Department of Justice, Washington 25, D.C.

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564116--60

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 356

HOMER HYCHE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 208–211) is reported at 278 F. 2d 915.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 1960 (R. 211). A petition for rehearing was denied on July 21, 1960 (R. 221). By order of Mr. Justice Black, the time for filing the petition for a writ of certiorari was extended to August 30, 1960. The petition for a writ of certiorari was filed on August 23, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's appeal was properly dismissed untimely.

RULE INVOLVED

Rule 49(c), F.R. Crim. P., provides as follows:

> Immediately upon the entry of an order made on a written motion subsequent to arraignment the clerk shall mail to each party affected thereby a notice thereof and shall make a note in the docket of the mailing.

STATEMENT

After a trial by jury in the United States District Court for the Southern District of Alabama, petitioner was convicted of alcohol tax violations. The verdict was returned on December 2, 1959. On that day, after asking petitioner whether he had anything to say before sentence was imposed, and after ruling on counsel's motion in arrest of judgment, the court imposed sentence of fifteen months' imprisonment and a $5,000 fine to commence on January 7, 1960 (see Pet. App. A, p. 9). Written formal judgments were entered that day. Notice of appeal was filed December 15, 1959. Counsel for petitioner states that no notice of the entry of judgment was sent and that counsel did not discover that judgment had been entered until December 15, 1959 (Pet. 4).

The court of appeals dismissed the appeal as untimely under Rule 37(a)(2), F.R. Crim. P., pointing out that sentence had been imposed in open court in the presence of petitioner and his counsel (Pet. App.

ARGUMENT

etitioner's appeal was untimely under Rule 37 2) since filed more than ten days after entry of ment. See *United States* v. *Robinson*, 361 U.S. Petitioner argues that, since the clerk did not him written notice of the entry of formal judg- which he states was required by Rule 49(c), ime should be counted from the time his com- iscovered that judgment had been entered, rather from the date of the entry thereof. Rule 49(c) ts the clerk to send notice of "the entry of an made on a *written* motion subsequent to ar- ment" (emphasis added). Petitioner's motion rest of judgment, however, was made *orally*, and fore Rule 49(c) by its terms does not apply. reover, petitioner's motion was specifically de- in open court in the presence of petitioner and ounsel before sentence was imposed. There was o reason for petitioner to rely upon the clerk's sed obligation under Rule 49(c) to send notice. are *Hill* v. *Hawes*, 320 U.S. 520. Nor may the t case be likened to *Rosenbloom* v. *United* , 355 U.S. 80, on which petitioner relies, in this Court found that petitioner and his attor- ad a basis for doubting that the motion for a rial and judgment of acquittal had been for- denied, and the order entered. In the present therefore, petitioner's time for appeal started from the time he was sentenced in open court. *nited States* v. *Isabella*, 251 F. 2d 223, 225 (C.A. *uff* v. *United States*, 192 F. 2d 911 (C.A. 5), ari denied, 342 U.S. 946.

CONCLUSION

The decision below is correct and there is no con-
t of circuits. It is therefore respectfully sub-
tted that the petition for a writ of certiorari should
denied.

J. LEE RANKIN,
Solicitor General.
MALCOLM RICHARD WILKEY,
Assistant Attorney General.
BEATRICE ROSENBERG,
FELICIA DUBROVSKY,
Attorneys.

EPTEMBER 1960.

U.S. GOVERNMENT PRINTING OFFICE 1960